

Chesapeake Bay Local Assistance Board
Special Meeting called for Tuesday, February 18, 2003
James Monroe Building
101 N. 14th Street, Conference Room B
Richmond, Virginia

Members Present:

Mr. Frank L. Benser
Mr. Robert J. Bannach
Mr. Colin D. Cowling
Mr. Donald W. Davis
Ms. Sue H. Fitz-Hugh
Mr. David C. Froggatt, Jr.
Mr. Daniel B. Nice

Members Absent:

Ms. Anna Lee Bamforth
Mr. Stuart Mendelsohn

Staff Present:

Acting Executive Director, C. Scott Crafton
Chief of Environmental Planning, Martha Little
Principal Environmental Planner, Shawn Smith
Principal Environmental Planner, David Kovacs

Mr. Benser called the meeting to order at 2:00 p.m. He noted that it was a special called meeting, referenced the agenda, and advised that the next regular scheduled meeting would be held on March 24, 2003. He reminded all those present that there was a sign up sheet, and asked that individuals sign up if they wished to address the Board.

Mr. Benser called for the Consideration of Delaying the Deadline for Tidewater Local Governments to Adopt Amendments to the Local Bay Act Ordinances. He noted that members had a copy of the Resolution with their agenda. Mr. Benser then called the role and noted that there was quorum.

Mr. Benser recognized Mr. Scott Crafton for comments. Mr. Crafton updated the members regarding the merger legislation, the budget, and the local compliance evaluation review process. He said regarding the merger legislation, the senate passed a bill with a couple of amendments that focused on bringing over the coastal zone management program from DEQ as part of the new division that will be created in DCR. The bill was then reported out of the House committee. He said that there was an amendment on the floor from the House to delay the merger's implementation until the summer of 2004. He said that the House adopted the bill with that amendment, and it went back to the Senate. Mr. Crafton asked Secretary Murphy to clarify his understanding. Mr. Crafton went on to say that he understood the Senate rejected the amendment and the bill will go to conference.

He said that as far as the budget is concerned, the budget conferees are in discussion and there was a budget amendment introduced by Senator Whipple, who is carrying the merger bill,

to restore the three positions that we had to give up as a result of the earlier budget reductions, and restore some of the operating budget that was lost during the fall budget reductions. Mr. Crafton did not know the disposition of this amendment at this point in time.

He went on to discuss the compliance review process, noting that the liaison staff had begun that process, had chosen the first locality to review, and are now conducting these initial reviews to work the kinks out of the process. He said that the Town of Cape Charles, City of Richmond, and Gloucester County had been selected for the initial reviews. He also advised that there are two vacant planner positions for which interviews are being conducted, and another planning position that will become vacant in March.

Mr. Crafton asked if there were any questions.

Mr. Davis asked if there was any money in the budget to fund the grants program.

Mr. Crafton responded that there was none in the general fund budget. He said that the agency had applied through DCR's Chesapeake Bay Implementation Grant for two hundred thousand dollars to make grants available to localities next year. That request is still being considered.

Mr. Crafton asked if there were any further questions. There were none.

Mr. Crafton stated that the matter about which the Board had been called to the special meeting related to the guidance that the agency had developed to help the localities interpret the Regulations. The specific guidance document that is at issue is one entitled "Resource Protection Areas: Onsite NonTidal Wetland Delineation." He said that the document was brought before the Policy Committee on October 29, 2002, and at that time, Mr. Toalson from the HomeBuilder's Association and others indicated that they did not feel like they had been given enough notice and had not had sufficient time to review the document. They asked if they could have more time, and meet with staff to discuss their concerns. Mr. Crafton stated he did meet with the HomeBuilders Association's regulatory and legislative committee to go over the specific concerns they had. He said that there were also comments from others, and he had taken the document off the website for further revisions. He said the document was revised and reposted in mid-January, and a request for additional comments was made. He said that what is being dealt with today is the result of continuing concerns that the building industry does believe have been resolved. The other issue that relates to this is that local governments are moving toward meeting the March 1, 2003 deadline for adopting the amendments to their local ordinances. He said that it may be that they will be in a position where these unresolved issues may affect decisions that localities will have to make as they implement their new regulations. He noted Secretary Murphy wrote that in view of these concerns, a letter to each member of the Board and each of the local governments explaining this and has requested that the Board consider extending the deadline to the end of the calendar year.

Mr. Crafton introduced Secretary Murphy. Secretary Murphy said that he was pleased to be at the meeting and thanked Mr. Crafton for calling the special meeting to consider the request that he had made to the Board in the letter dated February 11, 2003. He went on to say that he

had requested that the Board adopt a Resolution for an amendment to the existing Resolution to extend the deadline to December 31, 2003 for Tidewater Virginia Localities to adopt amendments to their Chesapeake Bay Preservation Act Ordinances in order to comply with the provisions to the Regulations that were adopted in December 2001.

He said that the request was not intended to require any locality to delay implementation but simply give them the option. He said this action would extend the deadline that had already been established; however, the conditions of the deadline would be the same as if they had been established in the prior Resolution.

Secretary Murphy went on to note that before he stated why he was making the request, he wished to make a few general statements about the program that was created by the Chesapeake Bay Preservation Act. He said that he had been the chief patron of the Act in 1988 and he remained as fully committed today to the program as he was at the time of its adoption of the legislation. He said the Chesapeake Bay Preservation Act has also had the unwavering support of the staff and of the Board and indicated his appreciation. He said that, working together, the program can be strengthened over the next several years. In addition to being the chief patron of the Act, he was also involved in the development of the original set of Regulations, and recalled very vividly the public hearings that were held when the Regulations were undergoing public comment. The implementation of the Bay Act was not without controversy and while the program has received increasing acceptance and support, it remains subject to challenge.

He said that a little over a week ago, concerns regarding the draft guidance document were brought to his attention by stakeholders representing a variety of interests with respect to the implementation of the Preservation Act. He said the concerns that were expressed to him came not just from the home building industry but also from the conservation community and local governments. He said that the concerns were broad based and not confined to one stakeholder group. He said that he reviewed these concerns with Scott Crafton and Russ Baxter and, following this review, he said he met with the various stakeholders, after which he became convinced from his experience as a lawyer that the draft guidance document contained provisions that would expose the ordinances adopted pursuant thereto to the probability of successful challenges.

Secretary Murphy said he had outlined the issues in his letter to the Board and the localities who are subject to the Act. He said that as Secretary of Natural Resources, he was responsible for all the environmental agencies that fall under this secretariat. A number of these programs overlap, and he said he would endeavor to make sure there is consistency across state agencies when the programs deal with the same resource. He went on to note that in this case, we was dealing with nontidal wetlands, which is not only a resource covered by the Regulations covered by the Chesapeake Bay Local Assistance Board but also Regulations adopted by the Department of Environmental Quality. He said that he believed that there is a need to have consistency within environmental agencies, and when he took office he became aware that agency heads were not meeting on a regular basis. There was no coordination or discussion between the agency heads as to how their programs fit with each other. He said that since that time, monthly meetings have been conducted so that all programs could be considered. He said

that this is vitally important . He stated that he believes further consideration needs to be given to the document and time is needed to complete this task.

Secretary Murphy asked if there were any questions. Hearing none, he went on to discuss the consolidation of the agency into the Department of Conservation & Recreation. He explained that in 1988, when the CBPA was adopted, the position of Secretary of Natural Resources had only been created the year before under Governor Baliles. At that time it was recommended that the Chesapeake Bay Local Assistance Department be created as an independent agency. He said that when he became Secretary of Natural Resources, he was surprised by the direction from the 2002 General Assembly to come up with a plan to consolidate CBLAD into DCR. He said that as result of the mandate that was contained in the appropriations act and adopted last year, he proceeded to develop the plan. He went on to note that the proposal involves not only the merger of the CBLAD into DCR, but he also proposed to move some of the coastal zone management programs from the Department of Environmental Quality (this program was previously housed in the Council on the Environment before it was eliminated) to this new division. He said that he believed habitat protection and nonpoint source water quality protection made sense. He also said that if legislation is adopted this year to move forward with that consolidation he would do everything he could to make sure the Bay Preservation Act and the programs there under are protected. The proposal in no way affects the Board membership or the Regulations adopted by the Board. Under the consolidation proposal, the Board would remain in tact just as it exists today, and the Regulations and amendments thereto will have force and affect that they do now. He said the merger would simply mean that the administration of the Act on a day to day basis would no longer be in a separate department, but instead would be in a Division within the Department of Conservation & Recreation.

Secretary Murphy said that the problem regarding the merger within the last year has been one of indecision. He said he had spoken to all the parties involved who are members of the General Assembly regarding the implementation date, and has pleaded with them to make sure that if the consolidation goes through, that it go through before the next session of the General Assembly. He said there is a need for certainty, and CBLAD cannot be left in a state of limbo not knowing whether the agency is going to be kept independent or merged. He said that of the effective date of the merger legislation were made July 1, 2004, we would still be in a state of indecision, and that is untenable.

Secretary Murphy then offered to answer any questions, and thanked Mr. Benser and the Board for the opportunity to speak.

Mr. Benser asked if there were any questions.

Ms. Fitz-Hugh asked besides the definition of perennial streams, what are the other objections to Regulation amendments being adopted locally now.

Mr. Murphy replied that under the original Regulations adopted by the Board, the term “tributary streams” was defined, and resource protection areas were to be measured from tributary streams. However, in the revised Regulations, that phrase has been changed to “water bodies having perennial flow.” He said that water bodies having perennial flow have not been

defined in the Regulations, therefore the lack of a definition is a problem. In the guidance document there was a statement that a protocol would be developed for determining when a water body with perennial flow existed or whether it was a intermittent stream or perennial stream, but the protocol has not been developed. He said that in his judgment, the protocol that gives this guidance should be issued concurrently with the guidance documents relating to other changes to the Regulations. He said by not having the protocol in place in advance, it has left the question unresolved, and he believes that this issue needs to be resolved. He said that there is also the issue of when a water body with perennial flow is contiguous to a nontidal wetland. He said the Regulations provide that you measure RPAs from a perennial stream or from nontidal wetlands that are contiguous to the perennial stream and are connected by surface flow to that stream. He said that there are provisions in the guidance that refer to the Corps of Engineers program of when a stream is adjacent to a wetland. He said the word “adjacent” is never used in the Regulations. He said that he believes the meaning of the word contiguous needs to be made clear and there should be consistency within the nontidal wetland Regulations adopted by DEQ. He said he believes there is a need to look at DEQ’s program in order to make certain that the two programs fit together in such a way that is meaningful, and effective and not subject to challenge.

Mr. Davis stated that he appreciated Secretary Murphy for taking the time to provide the background information and explaining the concerns.

Mr. Benser thanked Secretary Murphy, and asked if there was anyone else who would like to address the Board.

Ms. Patty Jackson, Executive Director of the James River Association came forward. Ms. Jackson noted that she had served on the Land Use Roundtable convened by the Chesapeake Bay Commission in the mid 80’s that came up with a recommendation for the Chesapeake Bay Preservation Act. She said she had worked with Secretary Murphy to get the bill passed and also to get the Regulations adopted. She said she also served on the advisory committee to CBLAD regarding clarification of the original Regulations and the amendments that the Board adopted in December 2001.

Ms. Jackson also said she had been at the Board meeting in December 2001 and was now amazed to see that in the eleventh hour, with local governments implementing their ordinances, that this issue has resurfaced and at the way it came to the Board in an emergency situation. She said there are serious reservations about a delay beyond what has already occurred in getting the Regulations adopted and implemented at the local level. She said that using the consolidation bill as a vehicle to force action by the Secretary and by the Board is extremely unfortunate, and she believes a more constructive alternate may have been to ask the Acting Director to reconvene the original stakeholders group to address issues of concern rather than to form a new stakeholder group. She said that had they been asked to come back together, they may have been able to help in recommending clarifications for the guidance documents.

Ms. Jackson stated her understanding that agencies are required to provide for public notice and comment regarding their guidance documents. She said that she had never seen a public notice about guidance documents from DEQ and felt this was an indication that no good

deed goes unpunished. She said that staff, in trying to be as forthcoming as possible in soliciting comments from those who are stakeholders in this process, unfortunately had that openness used against them in the legislative arena to extract a change to implementation. She said that those who were not involved feel that they were let down in the process. She urged the Board to step back from the concerns that have been raised and think about the fact that there are a number of other issues to be addressed by the Regulations that do not need to be delayed.

She explained that Hanover County ordinance not only defined perennial streams or blue line streams on USGS maps or a stream with at least 320 acres of drainage or a stream so determined in the field by the county engineer. She expressed concern about providing an extension to the implementation date, and suggested a July 1, 2003 deadline instead of a December 31, 2003 deadline.

Ms. Jackson offered to answer any questions. There were none.

Mr. Benser thanked Ms. Jackson for addressing the Board and asked if anyone else would like to address the Board.

Mr. Mike Toalson, Home Builder's Association of Virginia, came forward. He shared that a little over a year ago, when the Regulation was adopted, it seemed that the implementation date provided appropriate time for the ordinances to be adopted by local governments. He said that since that time there have been several changes. (i.e. change in administration, change in Directors, impact of the budget cuts, and a better understanding of the issues) that will significantly impact property rights of landowners in Virginia and, consequently, the value of the land, and will have a significant impact on economic development in the Commonwealth.

Mr. Toalson commended the Secretary for his action. He said that he had discussion with several localities who were also frustrated with the uncertainties that had been created by the proposed guidance documents. He urged the Board to move forward and adopt a Resolution to delay the local adoption deadline. Mr. Toalson pledged to work diligently to get the issues resolved.

Mr. Benser asked if anyone else would like to address the Board.

Mr. Phil Abraham came forward, representing Virginia Association of Commercial Real Estate for commercial and industrial developers in areas of Hampton Roads, Northern Virginia and the Richmond area. He said that they supported Secretary Murphy's proposal to allow localities an extension to the end of the year. He said that they looked forward to working with staff to address the issues. Mr. Abraham noted that a very important issue for their group was updating local RPA maps, so developers and individual citizens can understand the impact of the Regulation amendments on the amount of land that will be affected.

Mr. Brian Buniva, a local attorney stated that he represented the City of Richmond regarding a challenge to its Chesapeake Bay ordinance. He said that one of the issues being raised in the litigation is the level of discretion that the City staff can have with respect to the determination of RPAs. He said that he wanted to bring this to the Board's attention, because

there is active litigation taking place now in the City of Richmond where some of the issues that have been raised by the Secretary will be litigated. He advised that he also represented the Town of Exmore, to assist in conforming their ordinance to the 2001 Regulation. He said the Town is struggling to address the issues. The deadline delay will provide localities with additional time to work through the issues, and would appreciate the Board voting in favor of the Resolution or some form of it.

Mr. Benser called for the next speaker.

Mr. Roy Hoagland, Director of the Virginia office of the Chesapeake Bay Foundation, noted that the Bay Foundation had a long investment in the Preservation Act, the Regulations and the history of its development. Mr. Hoagland advised that he supported the proposal for the extension to the compliance action. He said that if the Resolution prohibited localities from moving forward, he would not be supportive; however, the proposed delay would provide a window of opportunity for those with vested interests in the program to resolve the issues. He said that for this reason he supported the Secretary's request for an extension.

Mr. Benser called for the next speaker or comments

Mr. Nice commented that he questioned what would happen if some of the localities went ahead and adopted without resolving these issues and whether that would expose the Board or localities to litigation.

Mr. Crafton advised that he was getting calls, and the localities will have to make their own decision. They need to look at the four issues and determine whether these issues are going to have any significant affect on the revision of their ordinances and the implementation of their revised ordinances. He said that he is advising that if there are issues for them, they may want to slow down. He also noted that some localities, like Henrico, whose staff believe that they have resolved the issues, and are not prohibited from moving ahead. He said it would be a case by case decision.

Ms. Little commented that nine localities had adopted before receipt of the letter.

Mr. Nice commented that he would like to see local adoptions done more uniformly to encourage them to hold off if in fact the Board adopts the Resolution.

Mr. Crafton said that the new definitions may be cause for both DEQ and CBLAD to revise their Regulations. In the meantime, there are localities that are coming up with a definition that they can support, and may be able to use what they have already decided on. He said that local governments have that flexibility now and would not like a one-size-fits-all approach.

Mr. Benser commented that at this time the Regulations are not being changed, that localities are required to adopt their ordinances based on the Board's Regulation. The concerns involve possible changes in the guidance language.

Mr. Bannach stated that he agreed with the Mr. Benser's comment, and this is simply fine tuning of the policy.

Mr. Benser said that whatever guidance came out would have to be in accordance with the Regulations.

Mr. Davis asked whether an ad-hoc committee was in place to look at the issues.

Mr. Crafton commented that Mr. Baxter from the Secretary's staff would be facilitating the process and had been in contact with him regarding who would be on the committee. He said the group would reflect the various stakeholders, but they are trying to keep the numbers manageable so that the committee can move forward quickly.

Mr. Davis asked if there was going to be at least one staff member, one board member and Mr. Crafton on this committee.

Mr. Crafton said that he would definitely be involved and probably several staff members. He advised that he had not had any requests from Board members to be on the committee.

Mr. Doug Wetmore, of CBLAD staff, addressed Mr. Nice's question about the legality and whether some local governments would be open to challenges.

He said that he had spoken with James City County after they received the Secretary's letter. The County believe they are on firm footing regarding the four issues and are moving ahead and hope to adopt by the end of the month. Mr. Wetmore went on to say even though these four issues exist, there are many other issues addressed through the Regulatory Amendments that would help localities clean up their ordinances significantly and eliminate other inconsistencies, and the localities he had spoken to did not want to slow down but want to move on.

Mr. Nice said that even if the Board agreed to the Resolution, localities could still move forward. Mr. Benser agreed that the localities were free to adopt anytime they wanted to. Mr. Benser went on to say that the disadvantage may be that localities who are now prepared to adopt may decide to postpone the adoption.

Mr. Donald Davis made a motion to approve the Resolution which would allow local governments to extend to December 31, 2003 the deadline for revising their land use ordinances.

CHESAPEAKE BAY LOCAL ASSISTANCE BOARD

February 18, 2003

RESOLUTION

Extending the Deadline for Tidewater Local Governments to Revise Local Land Use Ordinances and Regulations to Make Them Consistent with Amendments to the

Chesapeake Bay Preservation Area Designation and Management Regulations

WHEREAS on December 10, 2001, the Board adopted amendments to its Chesapeake Bay Preservation Area Designation and Management Regulations that became effective on March 1, 2002; and

WHEREAS at the same time, the Board, by resolution, also established a deadline of March 1, 2003 for submission by affected local governments of local Chesapeake Bay Preservation Act ordinances revised to be consistent with the amended Regulations; and

WHEREAS the Board is now persuaded that additional time is needed in order to resolve a number of issues that have arisen pertaining to the Regulations; and

WHEREAS the Board recognizes that, for some Tidewater local governments, these issues may not present significant obstacles to implementation of their local Bay Act programs, and those local governments may desire to continue with their plans and schedules to adopt the needed amendments to their local ordinances; now

THEREFORE, BE IT RESOLVED that the Board extends the original one year deadline for adoption of local Bay Act ordinance amendments to December 31, 2003; and

THEREFORE BE IT FURTHER RESOLVED that the staff of the Chesapeake Bay Local Assistance Department will, in a timely manner, complete the development of guidance associated with the aforementioned issues for local governments to use in the implementation of their Chesapeake Bay Preservation Act Programs.

The Director of the Chesapeake Bay Local Assistance Department certifies that the Chesapeake Bay Local Assistance Board adopted this resolution at a special meeting in open session on February 18, 2003.

C. Scott Crafton
Acting Executive Director
Chesapeake Bay Local Assistance Department

Mr. Nice seconded the motion.

Mr. Benser asked if there was any further discussion. Hearing none, he called for the vote. All members voted aye.

Mr. Benser asked if there anything else anyone wanted to comment on.

Mr. Cowling stated that he wanted to point out that particularly in North Hampton County, where the ocean side is under the Bay Act Regulations, and on the western edges of Onancock there are extensive marsh areas that are under Federal Regulations. Mr. Cowling stated that it had been fourteen months since the Regulations had been adopted. He said he came in late to the process, studied the regulation amendment, and did not fully understand them. Being from the Eastern Shore and being that there was no one oriented from the Board, he studied the agricultural aspects and has a thorough understanding of them. He said the question that begged to be answered is why fourteen months have passed and there is now a problem. He asked if there is something wrong with the Regulations. He answered that saying he does not believe so. He asked if there is something wrong with the interpretations or the guidelines. He said that he then heard from the Secretary that staff may be coming up with legally questionable definitions. He asked if there is adequate coordination between staff and the Attorney General's Office. He said he believes there is a need to take a hard look at themselves. He stated that as a member of the Board who was not a member of the Policy Committee, he arrived early and found out just by walking into the meeting what was going on. He said he further found out how concerned the stakeholders were, not from the Board but from letters from stakeholders. He said he was getting letters from people who knew more than he did.

He said that this is an embarrassing situation for a Board member and felt left out in the dark on this. He said that he also noted earlier there were some discussion between members of the policy committee and staff and that were almost adversarial. He said that staff was taking a position, and he believed that staff is here to advise the Board, not to take a position. He stated that staff did not have Regulatory authority.

Mr. Cowling said that there are a number of problems that have lead to this situation, and he believes that these really need to be resolved. He said he believes there is a need to involve the Board and establish the pecking order and who has the authority to do what.

Mr. Cowling closed his comments, noting his embarrassment over this situation. He said that he believes that his comments needed to be made.

Mr. Benser called for any other comments. There were none.

Mr. Benser called for a motion to adjourn. Mr. Nice motioned. Mr. Davis seconded. Mr. Benser adjourned the meeting.

Chairman
Frank L. Benser

Acting Executive Director
C. Scott Crafton